

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LARRY DEAN PETERSON,
Petitioner,
v.
KEN CLARK,
Respondent.

Case No. 07-cv-04069-CW

ORDER DIRECTING PETITIONER TO
FILE STATE EXHAUSTION PETITION
OR TO PROCEED WITH EXHAUSTED
CLAIMS

On August 8, 2007, Petitioner Larry Peterson, a state prisoner, filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On March 10, 2009, the Court issued an order granting Petitioner's request to stay his petition and administratively closed the case so that he could exhaust his unexhausted ineffective assistance of counsel claims in state court. See Doc. no. 12 at 10-12. In his motion, Petitioner stated that he could not file a state habeas petition because his appellate counsel had not returned his case files to him. In the March 10, 2009 Order, the Court ordered Petitioner's appellate counsel to deliver Petitioner's case files to him.

Petitioner filed quarterly status reports indicating that he could not file his state habeas petition because his attorney failed to return his case files to him. On October 25, 2010, Petitioner's attorney filed a declaration stating that she had returned all of Petitioner's files to him, with the exception of

1 audio tapes that the prison considers to be contraband. See Doc.
2 no. 23. However, in his quarterly status reports, Petitioner
3 continues to indicate that he has not received all of his case
4 files and, for this reason, he has not yet filed a state
5 petition. See e.g., Doc. no. 36, Petitioner's October 15, 2014
6 Status Report.

7 This case has been stayed for over five years and cannot be
8 stayed indefinitely. The Court will continue the stay for sixty
9 additional days. Petitioner must file his state court exhaustion
10 petition within sixty days from the date of this Order.
11 Petitioner must file his state court petition as best he can with
12 the information in his possession and the information he can
13 remember. In his state petition, he may include an explanation
14 about what information he does not have and why he thinks it
15 would help him. He also may ask the state court to provide him
16 with the records he needs. On the same date Petitioner files his
17 state petition, he must file a declaration with this Court
18 indicating he has done so.

19 Alternatively, Petitioner has the option of dismissing his
20 unexhausted claims and proceeding with the claims that are
21 exhausted. If Petitioner chooses this option, within twenty-
22 eight days from the date of this Order he must file a motion to
23 reopen his case, dismiss his unexhausted claims and proceed with
24 his exhausted claims. If Petitioner's petition includes
25 exhausted and unexhausted claims, he must file a motion to file
26 an amended petition with a proposed amended petition that
27 includes only exhausted claims.

28 If Petitioner does not file a motion to reopen his case or a

1 declaration indicating he has filed his state petition within the
2 aforementioned deadlines, this case shall be dismissed without
3 prejudice for failure to prosecute.

4 CONCLUSION

5 Based on the foregoing, the Court orders as follows:

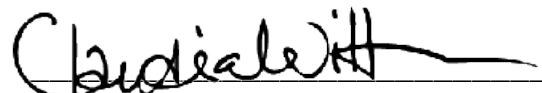
6 1. Petitioner must choose one of these two options:

7 (1) within twenty eight days from the date of this Order, he may
8 file a motion to reopen his case, dismiss his unexhausted claims
9 and proceed with his exhausted claims; or (2) within sixty days
10 from the date of this Order, he may file a state court exhaustion
11 petition and file a declaration with this Court indicating that
12 he has done so. If Petitioner files a state petition, he must
13 continue to file quarterly reports indicating the status of his
14 state petition.

15 2. If Petitioner does not file a motion to reopen his case
16 or a declaration indicating he has filed a state court petition
17 within the above deadlines, his case shall be dismissed without
18 prejudice for failure to prosecute.

19 IT IS SO ORDERED.

20 Dated: November 7, 2014

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22 CLAUDIA WILKEN
23 United States District Judge
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